

IN RE ARBITRATION BETWEEN:

**AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES,
AFSCME COUNCIL 5, LOCAL 34**

and

HENNEPIN COUNTY

DECISION AND AWARD OF ARBITRATOR

JEFFREY W. JACOBS

ARBITRATOR

August 1, 2011

IN RE ARBITRATION BETWEEN:

AFSCME Council 5, Local 34,

and

DECISION AND AWARD OF ARBITRATOR
Esther Killion Grievance

Hennepin County.

APPEARANCES:

FOR THE UNION:

Matt Nelson, Business Representative
Ester Killion, grievant
Kela Williams, Union Steward
Camarra Scullark, HSR III
Terrance Frelix, Sr., Office Specialist III
Milagros Romero-Ely, Office Specialist III

FOR THE COUNTY:

Bill Peters, Labor Relations Director
George Larson, Viking Security Officer
Darius Robinson, Viking Security Officer
Joyce Ward, Human Services Supervisor Century Plaza

PRELIMINARY STATEMENT

The hearing in the above matter was held on June 27, 2011 at the Hennepin County Government Center in Minneapolis, Minnesota. The parties submitted Briefs dated July 15, 2011 at which point the record was closed.

ISSUE PRESENTED

Did the County have just cause to terminate the grievant? If not what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2010 through December 31, 2011. Article 7 provides for submission of disputes to binding arbitration. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

COUNTY'S POSITION:

The County's position was that there was just cause to terminate the grievant for her actions on July 27, 2010. In support of this position the County made the following contentions:

1. The grievant was assigned to work at Century Plaza Building that houses many of the Hennepin County's social services programs and where many current and future clients come to receive or to apply for such services as Food Stamps, Medical Assistance, Rent Assistance and Child Care Assistance. The grievant is an HSR 3, which is a promotional position and requires a greater level of expertise and a higher level of responsibility for both the various aspects of the job as well as a higher level of accountability for her behavior.

2. The County asserted that at times the clients are very emotional about this given their sometimes desperate situations and that they will act out, use abusive language and even get physical with each other or with staff. For this reason the County has a security staff to provide security for the building. The security staff are not Hennepin County employees but rather work for a contractor.

3. Staff at Century, including the grievant are given permission to have clients ejected from the building for the use of abusive or profane language or where they act in other inappropriate ways. Employees are also allowed to refuse service or to discontinue service to clients who are acting inappropriately. County policy is very clear on this question and applies to staff too – staff are not to respond in kind with clients who may say offensive things or acting inappropriately. The County asserted that it is imperative that County staff keep their cool no matter how out of control they get and that they are trained not to incite them in any way. See Employer Exhibits 11, 12 and 13.

4. The County also acknowledged that the labor agreement provide that “normally” progressive discipline will be used, i.e., oral warning, written reprimand, suspension and finally discharge, but that the language clearly gives the County the right to advance to a more severe step, even dismissal immediately depending on the severity of the facts.

5. Despite that, the County has already orally warned the grievant about her language and gave her such a warning in June of 2010. While it may seem a bit of a quantum leap to go from oral reprimand to discharge, the County argued that this was appropriate here given the short time difference between the two incidents and the severity of her actions and language used on July 27, 2010. The County also noted that at first the grievant claimed at the hearing that the County had not given her a warning but after a short recess with the Union she came back and acknowledged that in fact she was given a warning. The County asserted that this shows her lack of credibility and propensity to try to fabricate facts until it becomes obvious that she cannot. The County further noted that the oral reprimand given for her actions on June 21, 2010 was not grieved and is now part of her record and may be considered as fact by the arbitrator in deciding what level of discipline was appropriate here.

6. The County asserted that as part of the oral reprimand, given only weeks prior to the events that led to her discharge, the grievant's supervisors met with her and explained the importance of using appropriate language and reiterated the County Policies on Code of Conduct, Diversity and Workplace Violence. They further made it clear that A. All Hennepin County employees and volunteers are responsible for understanding, complying with and supporting Diversity, Non-Discrimination and Respectful Workplace Policy; B. It is the responsibility of all Hennepin County employees and volunteers to create, promote and maintain environments in which all are respected, valued and welcomed; and C. Violations of this Policy will not be tolerated and that any employee violating this Policy will be subject to disciplinary action.

7. The County asserted that the grievant knew what these policies were and cannot be heard to say that she did not understand them. She was fully aware of her responsibilities to follow these policies and Exhibit appropriate workplace behavior for both clients and staff as well as visitors. The grievant was supposed to be a role model given her position.

8. The County then turned to the events of July 27, 2010 and noted that the grievant's actions that day were so outrageous they warranted discharge. The grievant was working at Century that day and overheard an incident between a co-worker and a client who was angry that the co-worker had made a mistake in processing her issue. The client became very abusive and the grievant interjected herself in that conversation and told the client to calm down. The grievant then went to get security officers. At this point the grievant's actions were within policy and were not inappropriate.

9. When she returned however, the client had calmed down and the co-worker had the matter under control. The grievant then exacerbated the situation and escalated it by re-engaging with the client needlessly.

10. The County relied on the testimony of two security guards who were there and escorted the client off premises while the other kept the grievant from getting any closer to the client. The County argued that these two security guards had nothing to gain by giving their testimony and that both had the excellent vantage points from which to see and hear the events. Both guards indicated that the grievant used very inappropriate language saying things such as, "I will meet you outside after work," or words to that effect and "my name is Esther and I will kick your ass."

11. The County asserted most strenuously that this sort of language is so over the top and so outrageous that it cannot be tolerated and deserves the highest form of punishment. The County further argued that it does not matter that the client was rude and inappropriate too – she was – but that is no excuse for the grievant's actions. The staff are expected to remain calm and not escalate a bad situation and make it worse. There have been incidents of physical violence, even the use of weapons at this facility and for the grievant to intentionally ignite this client endangered the client, her two small children and other staff and visitors.

12. The County presented a video tape of the incident and argued that while there is no sound it clearly shows the grievant returning from getting the security guards and that even as the first security guard was escorting the client out and clearly had things under control, the grievant stepped back in the hallway from her cubicle and continued to verbally engage and incite the client. The second security guard had to put his arm out to prevent/detain the grievant from going back into the hallway further raising the possibility of a violent altercation.

13. The County cast doubts on the grievant's credibility by noting that she denied all along making any of the statements attributed to her and that the only way that can be true is that both security guards, neither of whom work for the County or have any reason to lie or fabricate their stories are in fact lying. Both were in an excellent position to see and hear the events, both filled out reports that supported the assertion that the grievant re-engaged with this client and that she said highly inappropriate and with very provocative language. The County asserted that the grievant on the other hand has a very large incentive to make up part of her story – to keep her job and that she simply cannot be believed.

14. The County argued that the two security guards, Officer Larson and Officer Robinson were most credible and that they have consistent stories. Officer Larson testified that he arrived at the scene first and inquired whether there was a problem. The co-worker, Ms. Alexander, replied that there was one earlier, but she had only five more minutes with the client and wanted to continue and finish up the interview. See, Employer Exhibit 1.

15. Larson clearly indicated that it was the grievant who escalated this situation and that her actions were “dangerous” and that they made his job much harder. He had matters under control but the grievant re-started this argument. The County argued that this was thus much more than a quick hot tempered ill advised action but that the grievant had time to think about what she was doing yet still re-ignited the argument.

16. Larson indicated that the grievant's actions were some of the worst he has seen in five years as a security guard at this facility. The County further asserted that this was significant since there are frequent verbal and even physical altercations at this location.

17. Officer Robinson supported this story as well. He showed up somewhat later but had to physically restrain the grievant from going into the hallway area to get close to the client; who was already being taken out of the facility by Officer Larson. He also testified that he clearly heard the grievant use inappropriate language and threaten to meet the client in the parking lot and to "kick your ass." While his report, Employer Exhibit 2, was filled out some weeks later, he testified that this incident was so bad that it stuck out in his mind due to the grievant's actions. He was quite clear in his testimony that there was "no chance" that he was wrong or that he had heard something different

18. The County put Ms. Ward on to testify about the propriety of the penalty meted out in this case. She indicated that she conducted a fair and thorough investigation and determined that the evidence by the two security guards was more credible than that of the grievant, especially in light of the video. The County asserted that there can be little doubt as to the facts here and that the grievant simply cannot be trusted not to engage in this sort of behavior in the future. She further testified that even though the letter of discharge is dated August 20, 2010 and that the decision to terminate was not in fact made before they interviewed Officer Robinson.

19. The County rebutted the Union's claims that the grievant did not say what she is alleged to have said by pointing out that the two guards are credible and consistent and that the Union's witnesses were in many cases simply in no position to see or hear what happened and that in one case the Union witness was actually talking about a different incident.

20. Mr. Frelix indicated that he was down the hall a considerable distance from the incident and did not see who was shouting but that he heard someone shouting. That was about all he could say and it was clear that he was not in as good a position as the security guards. The Same could be said for Ms. Scullark. She too was not close to the incident and could only testify that she heard shouts.

21. Ms. Romero-Ely indicated that she saw the security guards escorting someone to the right of the cubicle when the video clearly shows this client being taken out to the left in the opposite direction from where she was sitting. Thus, her testimony about a client who was escorted out in front of her own work area is about a different person and is of course of no value here.

22. the County also pondered why Ms. Alexander was not called to testify and asserted that she was there for the entire matter and was not called by the Union to give any corroborative evidence. The County asked the arbitrator to draw a negative inference from the failure to call her and asserted that she would likely have supported the guards' story and not the grievant's.

23. The essence of the County's case is that the grievant was well aware of her responsibility to keep her cool during even very tense moments and that she certainly should not reignite a situation that was now under control in an effort to re-engage with and re-start an argument that could well have led to violence. Yet that is exactly what she did despite having been warned only days before to watch her language and her actions. The County asserted that termination is appropriate given the outrageous nature of the actions here.

The County seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The Union's position was that there was not just cause for the termination of the grievant in this matter. In support of this position the Union made the following contentions:

1. The Union pointed out that the grievant is an excellent employee and that literally all her Performance Reviews indicated that her performance was at least "fully capable" and even "highly commendable." She is a positive influence on the team and was a resource for many employees who knew that the grievant would "go the extra mile" to help them.

2. The grievant was also one of the higher performers at Century who would assist the team by processing cases and mentoring other HSR's so that claims for benefits would not be delayed. It was also noted that a "fully capable HSR 3 processes an average of 104 applicants per month and she averaged 123 applications per month. See Union Exhibit 1, grievant's 2010 review, which was done only 6 months before the termination.

3. The Union noted too that the grievant's disciplinary record is spotless except for one verbal reprimand she received a few weeks before the incident in question and that was for the allegation of inappropriate language used in a joking way when talking to some interns about County functions. There is no history of violence or use of inappropriate language in her file and no evidence that the grievant would not be able to adapt her behavior to the requirements of the County.

4. The Union also argued that the County should have used progressive discipline in this case and that the CBA is clear that "normally" progressive discipline is used. Here the County seeks to jump from oral reprimand to discharge – a huge quantum leap that the Union asserted was both contrary to the intent and spirit of the CBA as well as an unduly harsh result here.

5. The Union also noted that the County has never trained the grievant on how to best diffuse difficult situations or how to calm obstreperous clients. The Union argued that in the context of the work environment at Century that should have been done. The clientele can and often do act out, use profane or abusive language and have become violent. Despite this, the County provided no training to the grievant who is on the front lines and had to deal with clients like this every day.

6. Turning to the events of July 27, 2010, the Union had a very different take on what transpired that day. The grievant was in her work area when she heard a client becoming very loud and abusive toward a coworker. She could have simply ignored that but instead chose to deal with it and make sure the client, who was using words like "those idiots," "you are messing with people's lives" and various obscenities. The co-worker told the client to calm down. Instead the client continued her tirade to the point where the grievant needed to intervene.

7. The grievant engaged with the client and told her that the co-workers would get to her case as soon as she could and to please calm down. At that point the client turned her ire toward the grievant and began verbally attacking her. The grievant said that she would get security if she did not calm down. She didn't so the grievant went to get security officers. She can be seen in the video tape doing just that.

8. The Union took issue with the assertion by the County that the grievant immediately re-engaged with the client once she returned from getting security. The Union asserted that the grievant went to ask for security and returned to her desk. When Officer Larson got there he asked the grievant what was going on, as he recognized her as the person who had asked for security to show up. The grievant then pointed to the coworker's area indicating that the problem was in there. At that point it was the client who re-engaged in this verbal battle and began again ranting about the grievant "getting all up in her business," or words to that effect. The client asked who the grievant was and the grievant then stood up and said her name and told the client who her supervisor was in case she wanted to file a complaint. The client then called the grievant a nasty name and security began escorting her out.

9. The Union asserted that the grievant tried to remain calm during this exchange but that the client would not and continued to shout and call her names. The grievant and the Union contended most strenuously that the grievant never said she would "met the client in the parking lot." In fact the actual report indicated that she said "would meet her in the parking lot at 4," which make no sense since the grievant's shift ended at 5. The Union also contended that the grievant never said she would "kick" the client's ass or anything to that effect – instead it was the client that said that.

10. The Union further claimed that the sole reason the grievant followed the client out was to make sure that she was going out. The grievant was once assaulted by a client in an elevator, after thinking the client had already left. Because of that she now verifies that the clients have left so this des not happen again.

11. The Union assailed the security officers' reports and their credibility. The Union noted that Office Larson's report was done days after the events and that he "believed" the grievant had said certain things but was obviously not "certain" of it until he had been coached immediately prior to the hearing. The Union argued that the report cannot be given the great weight the County says it should. His memory is clearly not as accurate now as it likely was at the time and at the time he wrote only that he "believed" the grievant said she would kick the client's ass, etc. The grievant was quite certain she did not and has maintained her denial of this from the very beginning.

12. Further, Office Robinson's report was written two weeks after the events in question. Clearly, his memory of the event was clouded by the passage of time and the number of reports and other similar events that likely occurred between the time of the report and the event on July 27th. Further, his claim of a "photographic memory" is both absurd and unsupported by the facts. He claimed to recall exactly what was said but could not recall how many reports he needed to get to at the time of the hearing.

13. The Union noted too that the County's case rested entirely on the reports of these two officers and their version of the facts are both clouded by time and were clearly contrary to what is seen on the video and by the grievant's own testimony.

14. The Union also noted that the workplace is unfortunately full of such language and that one of its witnesses clearly heard another client yell, "I will kick your ass" at the same time as the client involved in this incident. It is entirely likely that the officers simply assumed the grievant had said something that someone else had in fact said. The Union argued ardently that these lingering doubts fall far short of the quantum of proof by a reasonable doubt that must accompany a discharge.

15. The Union also noted that Officer Robinson's report was dated August 10, 2010 yet the termination letter was written August 9, 2010 so it was apparent the County never even spoke to Officer Robinson *before* the decision to terminate was made. The Union assailed the investigation and asserted that such evidence makes it clear that the investigation was not fair and that the decision was apparently made even before the second officer's report was done. The Union asserted that this means that the grievant was not given a fair shake by the County and flaws the entire case against her.

16. The Union also pointed out that the other two witnesses, Mr. Freelix and Ms. Scullark, neither of whom had any reason to fabricate their stories either, indicated that the shouting likely came from the client and that they did not hear the grievant say anything like what the security officers said they heard. Ms. Scullark heard the grievant say that her name "was Esther and my supervisor's name is Joyce." These witnesses clearly supported the grievant's version of the facts.

17. The Union also noted that Ms. Alexander, the co-worker, who was in the next cubicle, was not called by the County. Since the County has the burden of proof, the fact that she was not called can also give rise to a negative inference that she would have supported the Union's case and asked the arbitrator to draw a negative inference from that.

18. The essence of the Union's case was that the grievant has a very good work record and a disciplinary record that has only a verbal reprimand. The Union also asserted that the penalty is far too harsh under these circumstances and that even if the arbitrator believes she erred in the events of July 27, 2010, discharge is far too harsh. Moreover, the grievant adamantly denied making the statements attributed to her that day and denied ever threatening the client or saying that she would "kick her ass." She further alleged that she gave the client her name as well as her supervisor

Accordingly the Union seeks an award of the arbitrator reinstating the grievant to her former position with full back pay and all accrued contractual benefits

DISCUSSION

Many of the salient facts of this matter were hotly contested. The record was clear though that the grievant is an HSR 3 working at Century Plaza and that her job entails assisting low income and indigent clients with food stamps and other forms of assistance. She works at Century Plaza and the evidence showed that at times this can be a difficult place to work. The grievant's work record is generally quite good and she has received favorable evaluations over time. In addition, the evidence showed that the HSR 3 position is promotional and that this is a position that demonstrates greater expertise in the social services areas. By all accounts the grievant is good at her job.

Clients can become frustrated with the system, the attendant delays in getting such help and can become very abusive both verbally and physically. They are many times quite desperate and need food and shelter and clothing for themselves and their families. Telling them that they will not get this assistance, or at least not right away, is a very demanding task. The County made it clear that the staff is expected to remain calm and to de-escalate such situations when they arise. It was apparent though that despite this, security is necessary and that staff are given permission to have clients escorted out of the building if they become out of control or use abusive or profane language. County policy reiterates this in many places and there was no question that the grievant had been given these policies in the course of employment. She also received a copy of them only a few weeks before the events of July 27, 2010 that led to her discharge.

The grievant was given an oral warning for her actions in June 2010 regarding some inappropriate comments made while addressing interns. She met with her supervisor and was given copies of the County policies on conduct and workplace violence and other appropriate behavior. At first the grievant did not agree that this was an actual oral warning. She eventually conceded that it was and that it was not grieved. Clearly, this was an oral warning and is part of her record. The question here is thus whether the events of July 27, 2010 were serious enough to warrant going from that level of discipline to a discharge.

Turning to the events of July 27, 2010 there were some things on which there was little doubt. First, the grievant was in her cubicle that day when she overheard a verbal altercation between her co-worker and a client. Apparently there had been some sort of mistake made by the coworker that resulted in a delay or some problem with the client's benefits and the client was angry about it and began verbally assaulting the co-worker.

The grievant went into the cubicle and the evidence showed that she then confronted the client telling her that she needed to calm down or she would get security. The client then turned her attention toward the client and began verbally assaulting the grievant. The grievant then went to go to get security. The video shows the grievant walking down the hall to get security.¹

The video Joint Exhibit 8 shows many people walking through the hallway by the grievant's work area without apparent notice of the altercation that was apparently underway within a few feet of the hall. For whatever reason, no one seemed affected or concerned and no one looked toward the cubicles to see or watch any commotion. At approximately 3:17:12 the client is seen being escorted out by Officer Larson. It is clear that she is still talking to someone over her shoulder and is being gently taken out by the security guard. At about 3:17:14 Officer Robinson is seen running down the hall in the direction of the cubicle. He arrives at 3:17:19 and sticks out his left arm as the grievant tries to enter the hallway area. Robinson then stands in the grievant's way and slowly pushes her back into the cubicle area. By 3:17:25 the client is out of the picture and the event is effectively over. The entire matter took place over perhaps 15 seconds.

¹ Both videos were reviewed in some detail and it should be noted that the time clocks are not synchronized on the two tapes but that this did not materially affect the decision in this matter. The actual video of the event itself was somewhat difficult to view as it skipped frequently and at times sped forward in fast motion. Still though it showed the material aspects of the salient events and showed the grievant going to get security, returning and then the client being escorted out a few second later and the grievant coming out a few seconds after that.

There is no sound on the video so it is not possible to determine with absolute accuracy now who said what to whom and when. The security officers indicated that they thought they heard the grievant threaten the client. Officer Larson indicates in his report that the grievant said she would “meet her [the client] outside after work.” See Employer Exhibit 1. Officer Robinson had no such statement in his report but wrote that the grievant said my name is Esther and I will kick your ass.”

The grievant adamantly denied saying this and instead she told the client that her name was Esther and that her supervisor’s name was Joyce. She indicated that she said that in case the client wanted to file a complaint.

There is perhaps nothing more difficult than trying to determine the truth in a case like this where people’s stories are diametrically opposed. This is especially true where some of the words were clearly uttered but the question is by whom. The County relied heavily on the testimony and statements of the two security guards but there are clear inconsistencies. Officer Larson indicated in his statement that the client called the grievant a “stupid bitch.” See Employer Exhibit 1. Officer Robinson indicated that he “never heard the other party saying or threatening Ms. Killion in any kind of way.” It was very clear from the evidence that the client did make statements that threatened the grievant and that this exchange was ongoing throughout the last 15 to 20 seconds of the exchange at the very least.

Given where he was standing, Officer Robinson was certainly in a position to hear what was said so either he is simply wrong in his statement, which is possible since it was done two weeks later, he was not paying careful attention to who said what during this exchange. This too is odd given his apparent photographic memory.

Likewise, some of Officer Larson's testimony was unpersuasive. He indicated that that this was the "worst" situation he had ever seen. This frankly was curious. Officer Larson has worked at Century for several years and there was ample evidence from several witnesses, including Officer Larson, that these kinds of incidents, including some involving actual physical violence, occurs with disturbing frequency. There was some sense that his testimony was exaggerated since this incident never involved any physical altercation. Moreover, when these insults were being hurled back and forth there were two security guards within arms reach of both women. This was clearly not "the worst" of anything.

In any event certain conclusions can be drawn from the evidence in the case, although since the video did not come with audio there is no absolutely certain way to determine this with mathematical accuracy.

Here the security guards indicated that the grievant said she would meet the client in the parking lot. At one point there was testimony that she said "I'll meet you in the parking lot at 4," or words to that effect. That is likely not what occurred. Based on the evidence as a whole, the more likely scenario is that the client said that and not the grievant.

Having said that however it is more likely than not that the grievant responded to this by saying something to the effect that she would "kick your ass," or words to that effect. It was clear that the grievant said something to the client as the client was walking away from the cubicle and this is shown on the tape when she appears from the cubicle only to be stopped by Officer Robinson.

While the Union's witnesses indicated what they thought the client had said that it was apparent that they were not in a good position to hear or see what was going on and their vantage points undercut their testimony. It was also apparent that at least one of the Union witnesses may well have been talking about an entirely different event.

It should also be noted that the one person who was absolutely in the best position to hear and see all of this was the co-worker, Ms. Alexander. She was there for the initial argument with the client and the initial entrance by the grievant. Only Ms. Alexander was there while the grievant went to get the security guards and during the second verbal altercation and the entry into the situation by the security guards as they escorted the client out the door. Why she was not called by either party was a mystery and frankly no inferences can be drawn either way since both parties would have had an incentive to call her to prove their respective cases.

The claim that Ms. Romero-Ely heard someone else say “I will kick our ass” is contrary to what she actually said at the hearing. Her testimony was reviewed in some detail to determine if that is what she really said. In fact her testimony was that she thought she heard this client say that and described an incident where the client was escorted out in front of her cubicle which was in the opposite direction of where the tape shows this client being taken. This simply cannot be a description of the same incident and it was not clear that these occurred at the same time. While Ms. Romero-Ely was quite sincere in her testimony it was abundantly clear she was talking about a different incident..

On this record the preponderance of the evidence shows that the grievant did re-engage with the client and while she may not have made all of the statements attributed to her by the security guards she likely made at least one of them. Further, and significantly, it is beyond dispute that she followed the client out into the hallway area and that she was clearly saying something to the client. It was also apparent that Officer Robinson is seen on the tape physically restraining her and it was apparent that this was likely done because of the possibility of some sort of further altercation.

The grievant’s story that she merely wanted to make sure the client was gone was unpersuasive on this record. It was clear that the client was being escorted out and that she was already with Officer Larson at that point.

Further it is not persuasive that the grievant told the client her name and the supervisor's name in order to facilitate filling out a complaint. The nature of this altercation as shown on the tape and described by the security guards as well as the Union witnesses, all of whom described a loud shouting match, simply does not lend itself to such a statement.

The Union argued that the County may have made its decision to discharge the grievant before getting the full report from Officer Robinson. There was some cogency to this assertion. The letter of intent to discharge was dated August 9, 2010 whereas Officer Robinson's report was dated August 10, 2010. This created some serious concern about the investigation and was a major flaw in the county's case.

Even though the "final" decision was not done until August 20, 2010, the mere fact that a letter of intent to discharge was sent before all the facts were known was troublesome. While it is true that the actual termination letter was dated August 20, 2010, the original notice of intent to discharge her and advising her of a Loudermill hearing was date August 9, 2010. At that point the County's investigation should have been completed yet they did not have the full report from Officer Robinson.

Having said that however, this discrepancy did not so undercut the County's case that the entire case should be overturned. A failure of investigation does not always result in a complete reversal of the discipline. Here it was clear that the County's determination would not have changed had they waited until they had Officer Robinson's report. His report merely strengthened what the County already had. Thus, while troublesome, this was not fatal; at least not here. Clearly the grievant re-engaged the client in this argument, albeit after the client used some inappropriate language. The question now is whether the totality of evidence warrants discharge for this event.

On this record it was clear that the grievant's actions were inconsistent with County policy even though the client was out of control. Obviously, the grievant must maintain calm during such events in order to maintain appropriate workplace demeanor and she clearly knows that. For whatever reason on this particular day she failed to do that. The question now is whether discharge is appropriate for what appears to be a relatively unusual incident for the grievant.²

Given her prior record and her otherwise good work ethic and demonstrated competency, it would be inappropriate to discharge the grievant on this record even though her actions were wrong. It was apparent they were in response to poor conduct by the client but frankly one bad day should not ruin an entire career.³

Clearly, while there was insufficient evidence to warrant the extreme penalty of termination on this record, neither would reinstatement without some very serious penalty. The arbitrator does not have the power to issue a true "last chance agreement" as future determinations must await future facts, the grievant must know that such actions, even in response to misconduct and bad behavior by clients is entirely uncalled for and inappropriate and cannot be tolerated. Just cause does require an examination of the penalty and a determination of whether the punishment truly fits the offense. This was difficult here since the grievant should have known better but on this record the totality of the evidence did not warrant termination for this offense under these circumstances.

² While the grievant had been given a verbal warning a few weeks before, this was not for the same type of charge and the County faced a somewhat uphill climb here in arguing that under these circumstances going from a verbal warning to discharge was appropriate even with the violation of County policy.

³ It should be noted that there was no physical piece to this incident. If there had been the discharge would have been sustained. Here while the grievant's actions were wrong, they may have been based on the client's bad behavior and the desire to protect a co-worker rather than a pattern of misbehavior or some sense that the grievant is incorrigible or untrainable. No such evidence was presented on this record.

Several options were considered given the facts and circumstances of this case. The grievant's prior work record, which is generally good, was taken into account, as was the fact that she had received an oral warning only a few weeks before for inappropriate language. While that warning was for something different, it should have left a more lasting impression on the grievant that she cannot engage with clients in situations such as this, even where the clients may say something abusive first.

Here, her actions in engaging in the first place were appropriate, as was going to get security. The problem occurred when she returned and things had calmed down and she then responded to the client's verbal abuse, made to the security officer by the way and not her, and re-igniting the argument. This, coupled with the statements she made as the client was being escorted out by security, should not have occurred.

Accordingly, the most appropriate remedy is to reinstate the grievant to her former position but without back pay or contractual benefits.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant shall be reinstated to her former position within five (5) business days of this Award but without back pay or contractual benefits.

Dated: August 1, 2011

AFSCME and Hennepin County Killion.doc

Jeffrey W. Jacobs, arbitrator